



U.S. Department of Justice

*United States Attorney  
Eastern District of New York*

WC:AEG/SD  
F.#2007R02181

271 Cadman Plaza East  
Brooklyn, New York 11201

November 13, 2009

**By Hand and ECF**

The Honorable Sterling Johnson, Jr.  
United States District Judge  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: United States v. Thomas Archer et al.  
Criminal Docket No. 08-288 (S-1)(SJ)

Dear Judge Johnson:

The government has reviewed the proposed Requests to Charge filed by defendants Rhuksana Rafique and Thomas Archer. The government objects to Request 11, which proposes a "Missing witness not equally available to defendant" charge.

Under Second Circuit law, to obtain a missing witness instruction the defendants must prove that (1) the potential witness is within the government's power to produce, (2) the person's testimony would be favorable to the defendant and (3) the testimony of the witness would not be merely cumulative. United States v. Torres, 845, F. 2d 1165.(2d. Cir. 1988); United States v. Tyers, 487 F. 2d 828, 831(2d Cir. 1973); see generally, Federal Practice and Criminal Procedure, Criminal section 489 (2d ed. 1982). At this time, the government is not aware of any potential "missing witness" which necessitates this charge.

Respectfully submitted,

BENTON J. CAMPBELL  
United States Attorney

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